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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1967

No. 1068

LEONARD THOMPSON,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the Court of Appeal, First Appellate District, State of California

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THE PEOPLE OF THE STATE OF CALIFORNIA,
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PETITION FOR A WRIT OF CERTIORARI
to the Court of Appeal, First Appellate District,
State of California

Leonard Thompson respectfully petitions that a writ of certiorari issue to the Court of Appeal, First Appellate District, State of California, to review the decision and judgment of that Court affirming the judgment of conviction of petitioner in the Superior Court of the State of California, in and for the County of San Francisco.

OPINIONS BELOW

The opinion of the California Court of Appeal (Appendix I) is reported in *People v. Thompson,* 252 Adv.Cal.App. 76 (1967). The denial of petitioner's petition for a hearing in the Supreme Court of California (Appendix II) is reported in 67 Adv. Cal. No. 7, "Minutes," p. 4 (1967).

JURISDICTION

The decision of the California Court of Appeal was filed on June 28, 1967; petitioner's petition for a hearing in the Supreme Court of California was denied on September 21, 1967. On December 14, 1967, Mr. Justice Douglas granted petitioner's request to extend the time to file petition for writ of certiorari. The time was extended to and including January 29, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

I

Whether the Sixth Amendment's guarantee of trial by jury applies to state criminal proceedings.

II

Whether a trial judge's statement to a jury that, in his opinion, the accused is guilty beyond a reasonable doubt is a deprivation of the right to trial by jury.

III

Whether a trial judge's statement to a jury that, in his opinion, the accused is guilty beyond a reasonable doubt is a deprivation of due process of law.

IV

Whether a trial judge's statement to a jury that, in his opinion, the accused is guilty beyond a reasonable doubt can be considered harmless error.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Fourteenth Amendment, Due Process Clause:

> "... nor shall any state deprive any person of life, liberty, or property, without due process of law. ..."

Constitution of the United States, Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. ..."

STATEMENT OF THE CASE

Judgment of conviction finding petitioner guilty of violating California Penal Code sections 209 (kidnaping for the purpose of committing robbery), 245 (b) (assault with a deadly weapon on a police officer), 211 (two counts) (robbery), and 12021 (possession

of a firearm by a person previously convicted of a felony) was entered on September 3, 1965 (Clerk's Transcript, 18-20). The Clerk's Transcript on Appeal, the Reporter's Transcript on Appeal (hereafter "R. T."), as well as the Reporter's Transcript on Appeal of the Opening and Closing Arguments of the District Attorney, have been certified to this Court. The facts developed from those documents reveal the following:

On May 19, 1965, two men gained entry to the Riskin home in San Francisco. One of them was armed with a gun (R.T. 34), the other with a knife (R.T. 51). They took money and some other belongings of the Riskins (R.T. 39, 50-51, 54). During the course of this intrusion one of the men forced one of the victims to go from the living room to the bedroom for the purpose of finding money and jewelry (R.T. 38-39).

While the robbery was in progress the police arrived and knocked at the door (R.T. 42). As the police entered the men left by a side door (R.T. 43). One of the officers, Frank Kerlin, observed a man, a Negro with a moustache, standing at the side door of the house. The man fled and Kerlin fired at him (R.T. 87). Kerlin decided to pursue the robbers in his police vehicle and so informed the central communications unit (R.T. 88-89).

Officers Arthur Garrens and Herman Clark received a radio call informing them of the pursuit (R.T. 12). They proceeded to the area and, on foot, began a search for the suspect (R.T. 123-124). Petitioner, a Negro with a moustache, was discovered, by

Garrens, in some bushes. He emerged from the bushes and, according to Garrens, attacked with a knife (R.T. 125-127). Petitioner was subdued by Garrens with the assistance of Clark (R.T. 127-128). Items taken from the Riskin residence were discovered in petitioner's possession (R.T. 94-96). The following morning a mask was discovered in the patrol car in which petitioner had been placed after his apprehension (R.T. 71-73). Both of the intruders wore masks (R.T. 34, 49).

Another piece of evidence was uncovered on the following morning. A ten-year old boy, who lived near the Riskins and saw the arrest of petitioner, discovered a loaded gun in his yard (R.T. 62-63). The gun was turned over to the police (R.T. 96).

A subsequent search of petitioner's hotel room produced a bullet casing (R.T. 193). According to the testimony of an expert the casing was probably fired from the gun discovered in the yard on the day after the robbery (R.T. 197-198, 203).

At the trial petitioner testified in his own behalf. He denied participating in the robbery (R.T. 211). He was, however, in the vicinity at the time of the robbery and it was there that he discovered an abandoned coat (R.T. 212). He found the Riskin items later discovered by the police in a pocket of the coat. He also found a gun in a pocket and threw it into the bushes (R.T. 213). He concealed himself in the bushes when he heard voices warning that they were about to shoot. A woman disclosed his hiding place to the

officers (R.T. 214). Petitioner emerged from the bushes with his hands up as the officers requested. They then told him to put his hands on his head and get down on his knees. He complied (R.T. 215). He at no point used a knife and was, instead, the victim of an unprovoked attack by the officers (R.T. 216-218). Petitioner was thoroughly searched before being placed in the police car; except for some papers and a pocket knife contained in the pockets of his tight-fitting jeans, everything was removed from him before he entered the police car (R.T. 219-221). At the police station he was beaten again and, as a consequence, spent twenty-three days in the hospital (R.T. 222-223).

Before the trial petitioner attempted to plead guilty to lesser charges. He was supported in this attempt by the prosecutor. The Court, however, refused to permit entry of the guilty plea (R.T. 11). Petitioner asked to speak to the Court about the offense, and after the prosecutor represented that nothing he said would be used against him (R.T. 12), made a highly incriminating statement (R.T. 12-15). The Court remained adamant in its refusal to permit entry of the plea of guilty (R.T. 17-18).

After all the evidence had been introduced at the trial, the judge, in his charge to the jury, said:

> "It is the opinion of this court based upon the evidence in this case that the defendant, Leonard Thompson, has been proved beyond a reasonable doubt to be guilty of each of the charges of the indictment. The charges of the indictment, now,

are Count One, charges him with kidnaping to commit robbery, a violation of 209 of the Penal Code; Counts Two and Three charge the defendant with robbery against Mrs. Riskin and Dr. Riskin, respectively. Count Four charges the defendant with an assault with a deadly weapon upon a peace officer, and Count Five charges him with possession of a firearm capable of being concealed upon the person while at a time when the defendant had been previously convicted of a felony. Now, I caution you that it is your right and your duty to exercise the same independence of judgment in weighing my comment on the evidence as you are entitled to exercise in weighing the testimony of any witness and the arguments of counsel.

"You will keep in mind that you are the exclusive judges of the credibility of the witnesses and of all questions of fact submitted to you. Such authority as the trial judge has to express his personal thoughts on any of these matters is confined to the sole purpose in aiding you in arriving at a verdict and may not be used, and is not used in this case, to impose his will upon you or to compel a verdict." (R.T. 258)

Petitioner was not identified as one of the robbers (see R.T. 49, 80). The entire case against him was based on circumstantial evidence.

REASONS FOR GRANTING THE WRIT

The instant case presents a significant and unresolved question of constitutional law. In *Parker v. Gladden*, 385 U.S. 363 (1966) this Court held that a bailiff's remark to a juror, "Oh that wicked fellow, he is guilty," resulted in a deprivation of an impartial trial by jury. The instant case raises the question of whether a more emphatic expression of belief in an accused's guilt by a judge to an entire jury results in a similar deprivation.

Most states that have passed on the question have found such comment error.[1] There are, however, exceptions.[2] The Federal Circuit Courts are also apparently divided over the question of whether comment on the guilt of the accused is ever proper and, if so, under what circumstances. In *United Brotherhood v. United States*, 330 U.S. 395, 408 (1947), it was said

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[1]See, e.g., *People v. Brock*, 66 Adv. Cal. 672 (1967); *Hamilton v. State*, 109 So.2d 422, 424-425 (Fla. Ct. App. 1959); *McFarland v. State*, 109 App. Ga. 688 (1964); *People v. Sprinkel*, 27 Ill.2d 398 (1963); *State v. Knutson*, 47 Idaho 281 (1929); *People v. Barley*, 76 Ill.App.2d 310 (1966); *State v. Bean*, 179 Kan. 373 (1956); *People v. Bigge*, 297 Mich. 58 (1941); *State v. Sedillo*, 76 N.M. 273 (1966) (dicta); *People v. Spitzer*, 294 N.Y. 5 (1944); *People v. Rafkind*, 3 N.Y.S.2d 997, 254 App.Div. 742 (1938); *State v. Anderson*, 263 N.C. 124 (1964); *People v. Clark*, 340 Mich. 411 (1954); *State v. Sanders*, 360 S.W.2d 722 (S.Ct. Mo. 1962); *State v. Pruitt*, 187 S.C. 58 (1938); *State v. Kallas*, 97 Utah 492 (1939); *Stoots v. Commonwealth*, 192 Va. 857 (1951); *Holober v. Commonwealth*, 191 Va. 826 (1951); *State v. Weinman*, 20 Wis.2d 106 (1963).

[2]*State v. Begyn*, 34 N.J. 35 (1961); *Commonwealth v. Ott*, 417 Pa. 269 (1965); *Commonwealth v. Raymond*, 412 Pa. 194 (1963). In Pennsylvania, however, if, from the judge's comment on a defendant's guilt the jury can reasonably conclude that the judge is in the possession of facts unknown to them, the comment is reversible error. *Commonwealth v. Young*, 418 Pa. 359 (1965).

that a judge may not direct a verdict no matter how conclusive the evidence. A judge's statement that an accused is, in his opinion, guilty, is not, technically speaking, a "direction" and so the courts have relied on an earlier case to determine whether such a remark is error when it does not rise to the level of a directed, or partially directed, verdict. That case is *United States v. Murdock,* 290 U.S. 389, 394 (1933), where this Court said: "Although the power of the judge to express an opinion as to the guilt of the defendant exists, it should be exercised cautiously and only in exceptional cases." *Horning v. District of Columbia,* 254 U.S. 135 (1920) was cited as an example of an exceptional case. *Horning* is, truly, an exceptional case. In *Horning* not only were the facts not disputed, they were agreed to by both parties. Some circuit courts have taken the *Murdock dicta* to mean that a judge may comment on the ultimate question of the accused's guilt only in a circumstance similar to that of *Horning.*[3] Others have suggested that such comment is never proper.[4] And some have stretched the *Murdock* language to uphold comment where the facts are not agreed to and are in dispute.[5]

Whether comment on the accused's guilt is a deprivation of the right to an impartial jury trial is, therefore, a question that needs to be resolved because of

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[3] *McBride v. United States,* 314 F.2d 79 (10 Cir. 1963); *United States v. Woods,* 252 F.2d 334 (2d Cir. 1958).

[4] *United States v. Ornstein,* 355 F.2d 222 (6 Cir. 1966).

[5] *Heinecke v. United States,* 294 F.2d 727 (D.C. Cir. 1961), cert. den. 368 U.S. 901 (1961); *Northern California Pharmaceutical Association v. United States,* 306 F.2d 379 (9 Cir. 1962).

a conflict among the circuits and the states. There is one other reason that compels resolution of the issue. If, as petitioner maintains, comment by a judge on his guilt is a deprivation of a right guaranteed by the United States Constitution, he is entitled to the benefit of the "harmless error" rule announced by this Court in *Chapman v. California*, 386 U.S. 18 (1967). So are other defendants similarly situated in states which, like California, consider comment error but do not consider it an infringement on a federal right requiring the rigorous *Chapman* test.

I

THE FOURTEENTH AMENDMENT REQUIRES TRIAL BY JURY.

This Court has held that the Sixth Amendment guarantee of trial by jury applies to criminal proceedings. In *Parker v. Gladden*, 385 U.S. 363 (1966), this Court held that "The command of the Sixth Amendment . . . that 'the accused shall enjoy the right to a . . . trial by an impartial jury . . . ' [is] made applicable to the States through the due process clause of the Fourteenth Amendment." 385 U.S. at 364. See *Irvin v. Dowd*, 366 U.S. 717, 721-22 (1961).[6]

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[6]See also *United States ex rel. De Lucia v. McMann*, 373 F.2d 759, 762 (1967); *People v. De Lucia*, 20 N.Y.2d 275, 281 (1967) (dissenting opinion of Van Voorhis, J.). This Court has noted probable jurisdiction in a case raising the question of the extent to which the Sixth Amendment guarantee of jury trial applies to state proceedings (No. 410, this term); and in *Bloom v. Illinois* (No. 52, this term) the Court will consider the extent to which the rule announced in *Cheff v. Schnackenberg*, 384 U.S. 373 (1966), applies to criminal contempt proceedings in state courts.

Parker thus overruled, *sub silencio*, *Maxwell v. Dow*, 176 U.S. 581 (1900) and *dicta* in other cases; see, *e.g.*, *Fay v. New York*, 332 U.S. 261, 288 (1947); *Palko v. Connecticut*, 302 U.S. 319, 324 (1937); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934), indicating that the right to trial by jury was not secured by the Fourteenth Amendment.

Constitutional law which has emerged since the *Maxwell* decision completely undermines its rationale. It was predicated, as was *West v. Louisana*, 194 U.S. 258, 264 (1904), on the notion that the Fourteenth Amendment does not make any of the specific guarantees of the Sixth Amendment applicable to the states. But, before *Parker*, this Court had held every guarantee of the Sixth Amendment, except the right to trial by jury, applicable to state criminal proceedings. See *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (speedy trial); *In re Oliver*, 333 U.S. 257 (1948) (public trial and notice of the accusation); *Pointer v. Texas*, 380 U.S. 400 (1965) (confrontation); *Washington v. Texas*, 388 U.S. 14 (1967) (compulsory process); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel).

In light of those decisions it would have been curious indeed if the Sixth Amendment guarantee of jury trial were the only particular in the Sixth Amendment not applicable to state court criminal proceedings. Bill of Rights guarantees are applicable to such proceedings when the right is "so fundamental and essential to a fair trial that it is incorporated in the

due process clause of the Fourteenth Amendment." *Washington v. Texas,* 388 U.S. at 17-18. In *Pointer v. Texas, supra,* this Court stated: "[t]hat the fact that [a] right appears in the Sixth Amendment of our Bill of Rights reflects the beliefs of the framers of those liberties and safeguards that [it is] a fundamental right essential to a fair trial in a criminal prosecution." 380 U.S. at 404.

By providing the right to trial by an impartial jury, the framers placed in the Sixth Amendment the most fundamental safeguard to a fair trial. That right is traceable to the earliest Saxon colonies, III *Blackstone, Commentaries* 349, and constituted one of the principal articles of Magna Charta. *Blackstone* described it as "the most transcendent privilege which any subject can enjoy or wish for. . . ." *Id.,* at 379. The right was expressly included in the English Bill of Rights of 1689,[7] one of the basic sources for the Bill of Rights to the United States Constitution. Rutland, *The Birth of the Bill of Rights,* 1776-1791, p. 19 (1955).

When the framers of the Declaration of Independence composed their list of grievances they included the denial "in many cases, of the benefit of trial by jury." The former crown colonies remedied that by, without exception, including the guarantee of trial by jury in criminal cases in every constitution adopted between the War of Independence and the formation of the American Union. See Thorpe, *The*

[7] I Will. III and Mary II, Sess. 2, c. 2 (1689), para. 11.

Federal and State Constitutions, Colonial Charters, and Other Organic Laws, V, 2594-98 (1909).

Trial by jury in criminal cases is one of the very few individual rights that the framers included in the body of the United States Constitution. Article III, section 2. See *The Federalist,* No. 83 (Hamilton). It is the only such provision restated in the Bill of Rights. See *Toth v. Quarles,* 350 U.S. 11, 16 (1955).

The history of the right to trial by jury in criminal cases establishes it as one of the most fundamental of rights preserved in the United States Constitution. Accordingly, it applies to state criminal proceedings by virtue of the Fourteenth Amendment.

II

THE JUDGE'S STATEMENT TO THE JURY DEPRIVED PETITIONER OF HIS RIGHT TO AN IMPARTIAL JURY TRIAL.

Petitioner was, in effect, tried by a judge and not a jury.

In *Parker v. Gladden, supra,* this Court held that a statement by a bailiff conveying his view that the defendant was guilty resulted in a deprivation of the right to an impartial jury trial guaranteed by the Sixth and Fourteenth Amendments.

Jurors may rely on statements of bailiffs and they may place a great deal of confidence in the views of those who see to their welfare, see *Turner v. Louisiana,* 379 U.S. 466 (1965), but they do not have the influence of a judge.

The judge is the dominant figure in the courtroom, a courtroom designated as the court of the magistrate presiding. He overshadows the lawyers, the witnesses and the litigants. In the jurors' minds he is identified as a person of superior wisdom in matters of law, superior experience as to matters of fact and, other than the jurors themselves, the only nonpartisan in the courtroom.

The jurors also know the judge has access to information about the case before them that is unavailable to them. They know that proceedings occur outside their presence and that those proceedings have to do with what evidence will be presented to them and what evidence will not be presented to them.

When the judge speaks it is the jurors' duty to listen and when he tells them that the accused is guilty beyond any reasonable doubt on each individual count, they are going to listen very closely, and act accordingly. The judge's admonition that his statement is to receive no more weight than any other testimony is not going to dilute the impact. His statement will have more weight because, unlike the other testimony, it has not been subjected to cross-examination and, unlike the other testimony, it has come from an ostensibly impartial source with access to every fact in the case.

In the instant case the judge suggested to the jurors that evidence might be kept from their consideration (R.T. 23-24), and evidence that had been alluded to (R.T. 32-33, Reporter's Transcript on Appeal of Opening and Closing Arguments of the Dis-

trict Attorney, p. 3) was excluded (R.T. 161-162). Additionally, petitioner, prior to trial and after a representation by the prosecutor that nothing he said would be used against him (R.T. 12) made some highly incriminating admissions (R.T. 13-15).

In *Parker v. Gladden*, the comment was made by a bailiff, a person not available for cross-examination and a person whom the jurors might reasonably conclude knew more about the case than they did.

Here the comment was made by a person who could not be cross-examined, a person whom the jurors *knew* had information unavailable to them and a person who in fact had such information.

The practical effect is that petitioner was deprived of his right to trial by jury. The judge usurped the jury's function. "The very object of the jury system is to secure unanimity by a comparison of views, and by agreement among the jurors themselves." *Allen v. United States*, 164 U.S. 492, 501 (1896). The verdict in this case was the product of the thinking of a single man, a view untested by any confrontation with contrary views.

This single man, in arriving at his verdict, was undoubtedly influenced by admissions and a confession that could not have been placed before the body charged with the reponsibility of trying the facts. In *Jackson v. Denno*, 378 U.S. 368 (1964) this Court gave constitutional recognition to the danger to due process inherent whenever a single body determines both the admissibility of evidence and the guilt or innocence of the accused. If a judge, aware, as the

judge was here, of inadmissible admissions may comment upon the guilt of the accused, the defendant's constitutional right to have illegally obtained evidence and other inadmissible evidence "entirely disregarded," *id.* at 389, is illusory.

In *United States v. Murdock, supra,* 290 U.S. 389, 394 (1933), this Court said that, "in exceptional cases" a judge has the power to comment on the guilt of the accused. The Court noted that *Horning v. District of Columbia, supra,* 254 U.S. 135 (1920) was the sort of case it had in mind. In *Horning* no facts were in dispute, they were all agreed to. It was not the theory of the defense that the defendant had not committed the proscribed acts but only that those acts were not a violation of the law. The case is thus analogous to the situation in which an element of a crime is not contested under the theory of the defense and the judge thus assumes the elements proved in his charge to the jury.

For example, in a prosecution for passing counterfeit currency, where the defense is a lack of knowledge about the counterfeit character of the currency, it is not improper for a judge to assume in his instructions to the jury that the bills were in fact counterfeit even though that is one of the elements of the crime.[8] In a prosecution for forcible rape where the theory of the defense is mistaken identity, an instruction on lack of consent, an element of the

[8] See, *e.g., United States v. Jonikers,* 147 F.2d 675 (7 Cir. 1952), cert. den. 344 U.S. 877 (1952); *Wellman v. United States,* 297 F. 925 (6 Cir. 1924); compare with *Mims v. United States,* 375 F.2d 135, 147-148 (5 Cir. 1967).

crime, might prejudice the defendant. The genesis of the *Horning* rationale is obvious. Even so, petitioner submits that the dissent of Justice Brandeis, speaking for three of the four dissenters in *Horning,* is the sounder view. When a defendant pleads "not guilty" he is entitled to have the trier of fact, the jury, decide the ultimate issue without having the judge overcome their "will by the weight of his authority." *Id.* at 139 (dissenting opinion of Brandeis, J.).

But even if *Horning* is good law it has no application here. The facts were not agreed to. They were sharply contested. This is not the "exceptional case" in which comment would be proper. Under the rationale of *United States v. Murdock, supra,* the comment was improper and requires reversal.

The Sixth Amendment to the United States Constitution guarantees the petitioner the right to a trial by jury. He can constitutionally be convicted only by the unanimous decision of twelve peers, after consultation among themselves about the evidence developed against him from the witness stand, finding him guilty of the proscribed acts beyond any reasonable doubt. He has not received that jury trial.

III

THE STATEMENT OF THE TRIAL JUDGE DEPRIVED PETITIONER OF DUE PROCESS OF LAW.

Even if it be assumed that the Sixth Amendment's guarantee of trial by jury does not apply to the states, this Court has recognized that once jury trial is afforded, the Fourteenth Amendment commands that the trial be before an impartial jury. *Turner v. Louisiana, supra; Irvin v. Dowd,* 366 U.S. 717 (1961).

Petitioner did not receive an *impartial* jury trial. *Parker v. Gladden, supra,* held that a much less comprehensive expression of belief in guilt emanating from a much less influential source and directed to fewer jurors in a situation not ostensibly authorized by the trial process resulted in a jury trial that did not meet the standard of impartiality. The error in the immediate case is more obvious and more egregious.

Parker, it might be argued, is distinguishable by this line of reasoning: It is true that a bailiff's comments carry less weight than a judge and that a judge's remarks are liable to have a greater influence on a jury, but a bailiff could not have tried the defendant. Since the states are not required to provide a trial by jury a judge could have decided the question of guilt or innocence on his own and an expression of opinion on his part would have been necessary.

The flaw in that reasoning is that California does provide for trial by jury. Petitioner, relying upon the division of functions and assuming that the jury would actually be the trier of fact, made incrimi-

nating admissions to the judge after the District Attorney had represented that his statements would not be used against him. The judge, who could not help but be influenced by those statements, then expressed his opinion on the guilt of petitioner to the jury.

Petitioner, no less than Parker, was denied the right to a trial by an impartial jury on the evidence developed in Court.

IV

THE STATEMENT OF THE TRIAL JUDGE WAS PREJUDICIAL ERROR.

The Court below recognized that the judge's comment was improper but, finding no violation of any constitutional right, *People v. Thompson,* 252 Adv. Cal.App. 76, 93 (1967), concluded that it was harmless error applying the "miscarriage of justice" test provided in California Constitution, Article VI, section 13. *Id.,* at 94.[9]

The California Court of Appeal was, as noted above, in error when it decided that no federal constitutional right had been infringed by the comment. The harmless error rule applied by it does not meet the standard required in cases where error is of constitutional dimension. *Chapman v. California,* 386

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[9]And see *People v. Brock,* 66 Adv.Cal. 672, 682 (1967).

U.S. 18 (1967); and see *Anders v. California,* 386 U.S. 264 (1967).[10]

Nor was the comment conceivably harmless.

The harmless error rule goes to technical errors not affecting the substantial rights of a defendant. *Bollenbach v. United States,* 326 U.S. 607, 614 (1946); *Weiler v. U.S.,* 323 U.S. 606, 611 (1945).[11] The error in the immediate case, affecting as it did one of the most fundamental of rights, the right to an impartial jury trial, is not a "technical error."

This Court has long recognized that there are certain errors of such magnitude that they are inherently prejudicial. See *Jackson v. Denno,* 378 U.S. 368, 376-77 (1964); *Haynes v. Washington,* 373 U.S. 503, 518-19 (1963); *Spano v. New York,* 360 U.S. 315, 324 (1959); *Payne v. Arkansas,* 356 U.S. 560 (1958) (coerced confessions); *White v. Maryland,* 373 U.S. 59, 60 (1963); *Gideon v. Wainwright,* 372 U.S. 335 (1963); *Hamilton v. Alabama,* 368 U.S. 52, 55 (1961) (right to counsel).[12]

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[10]California's substantive rule ("It is not reasonably probable that a result more favorable to the defendant would have been reached in the absence of the error") is not only less stringent than the rule announced by this Court but the California rule puts the burden of establishing prejudicial error on the appellant who is attacking the verdict. See *People v. Watson,* 46 Cal.2d 818, 836-38 (1956).

[11]For a thoughtful and scholarly discussion of this point see *People v. Ross,* 67 Adv.Cal. 58, 70-80 (1967) (Traynor, C.J., dissenting).

[12]And see *Wood v. U.S.,* ..... U.S. ....., 19 L.ed.2d 20 (1967) (right to counsel); *Roberts v. LaVallee,* ..... U.S. ....., 19 L.ed.2d 41 (1967) (equal protection). In *Miller v. California,* No. 154, 19 L.ed.2d 459 (1967), this Court has posed the question of whether certain kinds of inculpatory admissions may ever be considered harmless error.

This Court's rule of "inherent prejudice" has always been invoked when an error has resulted in the denial of trial by an impartial jury. *Parker v. Gladden, supra,* 385 U.S. at 365; *Sheppard v. Maxwell,* 384 U.S. 333, 352 (1966); *Estes v. Texas,* 381 U.S. 532, 542-543 (1965); *cf. Rideau v. Louisiana,* 373 U.S. 723, 727 (1963); and see *Tumey v. Ohio,* 273 U.S. 510 (1927) (impartial judge).

Moreover, even when the substantive rule of *Chapman* is applied to the facts of this case it is apparent that the error complained of cannot be considered harmless. The rule is that the beneficiary of a constitutional error must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California, supra,* 386 U.S. at 24. That rule means that error is prejudicial when there is a reasonable possibility that it had a substantial influence on the minds of the jurors. *Fiswick v. United States,* 329 U.S. 211, 217-220 (1946); *Kotteakos v. United States,* 328 U.S. 750, 764-765 (1946).

That is necessarily the case where the judge has expressed his opinion as to the guilt of the accused. In *Starr v. United States,* 153 U.S. 614, 626 (1894), this Court said:

> "It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intonation is received with deference, and may prove controlling." Accord, *Bollenbach v. U.S., supra,* 326 U.S. at

612; and see *Bihn v. United States*, 328 U.S. 633, 637-38 (1946).[18]

Petitioner was convicted by circumstantial evidence and circumstantial evidence alone. He contradicted directly every bit of testimony and every possible inference that pointed to his guilt. If the error is found harmless it will mean that appellate courts will be resolving questions of credibility from the record before them.

> "In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record. . . ."
>
> *Bollenbach v. United States, supra*, 326 U.S. at 615 (1946).

[18]The judge's admonitions that the jurors were the triers of fact did not, of course, cure the error or make it any the less prejudicial. *Bollenbach v. U.S., supra; United States v. De Sisto*, 289 F.2d 833 (2 Cir. 1961); *McBride v. United States*, 314 F.2d 75 (10 Cir. 1963); *Davis v. United States*, 227 F.2d 568 (10 Cir. 1955); *People v. Bigge*, 297 Mich. 58 (1941). In *Jackson v. Denno, supra*, this Court held that jurors could not reasonably be expected to follow a judge's admonition requesting them to disregard evidence that was improperly admitted. In the instant case they were not admonished to disregard the judge's statement; instead, they were asked to weigh it as they would other testimony.

CONCLUSION

For the aforementioned reasons, petitioner respectfully submits that the relief prayed for be granted.

Dated, San Francisco, California,
January 24, 1968.

Respectfully submitted,

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MARSHALL W. KRAUSE,
Staff Counsel,
Attorneys for Petitioner.

(Appendices Follow)

Appendix I

In the Court of Appeal
State of California
First Appellate District

DIVISION ONE

1 Criminal No. 5473

People of the State of California,
Plaintiff and Respondent,
vs.
Leonard Thompson,
Defendant and Appellant.

OPINION

Defendant appeals from the judgment of conviction entered upon a verdict finding him guilty of kidnaping for the purpose of committing robbery (violation of Penal Code section 209),[1] assault with a deadly weapon on a peace officer (violation of section 245b), possession of a firearm by a convicted felon (violation of section 12021), and two counts of robbery (violation of section 211). Defendant's contentions are

[1]Unless otherwise indicated, all statutory references are to the Penal Code.

as follows: that certain evidence was illegally obtained and therefore should not have been introduced; that the evidence was insufficient to support the verdict as to all counts excepting assault; that the count charging possession of a firearm should have been dismissed prior to trial upon defendant's motion under section 995; that the trial court failed to give certain instructions; that the trial court's comment as to his opinion regarding defendant's guilt was improper; that defendant was denied the effective assistance of counsel; and that the various errors committed by the trial court resulted individually and cumulatively in a miscarriage of justice.[2]

The Record

On the evening of May 19, 1965 Dr. and Mrs. Alexander Riskin were at their home at 120 Belgrave, San Francisco. At approximately 10:00 p.m. their front doorbell rang and Mrs. Riskin proceeded to the door to open it. As she did so two men pushed their way into the house. One, who was wearing a dark green toggle coat and had a ski mask over his face, carried a gun; the other wore no mask and carried a large knife. As the men entered Mrs. Riskin started screaming. The man with the gun said, "Shut up; shut up or I will kill you." However, she continued to scream so that the man with the gun put his hand

[2]In his opening brief defendant also contended that the sentences imposed upon him for robbery and assault constituted multiple punishment in violation of section 654, but he has abandoned this contention in his closing brief.

over her mouth and pushed her to the floor. At the same time he told Dr. Riskin, who had followed his wife to the front door, to sit down on the floor. Dr. Riskin then asked the men not to hurt his wife because she was just home from the hospital. In response to this request one of the men replied, "We know all about it. We read it in a newspaper and that is why we are here." One of the men then went in the Riskin's living room where Marilyn, their daughter-in-law had been conversing by telephone with her husband, who was in Los Angeles. Marilyn was then brought out to the hall and ordered to sit on the floor next to Dr. and Mrs. Riskin. At this time the man with the knife, who had meanwhile put a mask on his face, told the Riskins that his companion was dangerous and in need of "a fix" and asked them if they had any morphine.

The men then asked where the money and the jewels were, Mrs. Riskin responding that they were upstairs in the bedroom. However, when the man with a gun pointed his gun at Marilyn and asked her to go upstairs and show him the money and jewels, Mrs. Riskin interjected that since it was her house and she knew where everything was she would go. Mrs. Riskin then arose and started up the stairs behind the man with the gun. Part way up the stairs Mrs. Riskin turned around and looked down at her husband and daughter-in-law and the man standing over them with a knife. However, when the man with the gun waived his gun and said "Come on, come on," Mrs. Riskin proceeded up the stairs and into the bedroom.

Once in the bedroom the man with the gun took some items from Dr. Riskin's trousers, including a small pocket knife, a watch, keys, and some bills from a wallet. The man then put these items in his pockets and he and Mrs. Riskin went downstairs to the dinette, where the man took some change from Mrs. Riskin's purse. The two then proceeded to the living room where the man continued his search for valuables. He then took Mrs. Riskin back to the entry hall and ordered her to sit on the floor with her husband and daughter-in-law.

At this time Officers Frank Kerlin and Burt Olson of the San Francisco Police Department, who had received a call in their radio car that there was a burglary in progress at 120 Belgrave,[3] arrived at the Riskin residence and demanded entrance. When Marilyn opened the front door after being admonished by one of the men not to do so, the officers entered the hallway of the Riskin house. Upon entering, Kerlin saw Dr. and Mrs. Riskin lying on the floor. In addition Kerlin saw a man standing in a doorway on the side of the hall. This man was wearing a blackish-green jacket with wooden buttons and had a hood over his head. As he saw the officers he dropped the knife he was carrying and ran through the door. At this point Mrs. Riskin shouted "He has got a gun. . . . He will kill you." Kerlin, however,

[3]Steve Riskin, Marilyn's husband, testified that while he was talking by telephone to Marilyn shortly before 10:00 p.m. on May 19, 1965 his wife informed him that a robbery was taking place at the Riskin residence; and that he then called the San Francisco Police Department and reported the robbery.

followed the man through the doorway which led to the outside of the house. As Kerlin rounded the doorway he saw the man at the foot of the stairs. At this time the man had pulled the hood off his head and looked back at Kerlin, who observed that the man was a Negro with a thick growth or shadow beneath his nostrils. Kerlin shouted to the man to halt. However, the man ran through the trees. Kerlin then pursued the man in his police car, but although he observed the suspect running, he lost the man in the vicinity of Shrader and Alma Streets.

At this point Kerlin was joined in his search by Officers Clark and Gerrans, who had heard Kerlin's report to communications that he was in pursuit of a robbery suspect. Shortly thereafter Gerrans discovered defendant hiding in the bushes in the yard at 1241 Shrader. Although defendant emerged from the bushes upon Gerrans' command, as he did so he lunged at Gerrans with a knife, thereby cutting Gerrans' hand. A scuffle between Gerrans and defendant then ensued. However, when Clark arrived on the scene, the two officers were able to subdue defendant. Defendant was then taken to the police car where, based upon the fact that he was a Negro, had a thick mustache underneath his nostrils, and was wearing a greenish-black jacket with toggle buttons, Kerlin identified defendant as the man whom Kerlin had observed on the stairway at the Riskin home.

Various items of jewelry which were identified at the trial as belonging to the Riskins were found by the police on defendant's person at the time of the

arrest and in the back seat of the police car in which defendant was transported after his arrest. These items were introduced into evidence as was a loaded gun which was found by Bradley Thomas in his yard at 1241 Shrader Street on the day after the robbery. Also introduced into evidence was a .38 caliber Colt bullet casing which was found in an attache case in defendant's hotel room on May 20, 1965 by Inspector Emile Dutil of the San Francisco Police Department. Charles Fontan, a criminologist in the San Francisco crime laboratory, testified that in his opinion the bullet casing had been fired by the gun found in the yard at 1241 Shrader Street.

Defendant was the only witness for the defense. He testified that he had never been in the Riskin home; that he was in the vicinity of their home because he was supposed to meet a man named James Benson in a bar on Carl Street; that as he was looking for Benson, a man ran past him and threw a coat on the ground; that because this coat was better than defendant's, defendant picked it up; that he then went into the yard at Shrader Street where he took off his own jacket and tried on the coat he had found; that he felt a gun in the coat pocket, took it out and threw it in the bushes; that when he heard cars approaching he became scared and hid in the bushes; that when a flashlight was pointed at him he came out of the bushes; that the officers who apprehended him made him kneel down and pushed his face in the mud; and that they also struck him in the mouth, causing the wire in his false teeth to break and to cut

his mouth and the hand of one of the officers. Finally defendant testified that the officers hit him several times both in the yard and at the police station.[4]

Alleged Illegal Search and Seizure

Defendant contends that the bullet casing which was found in his hotel room by Inspector Dutil was obtained as a result of an illegal search and seizure and was therefore improperly admitted into evidence. The evidence which was elicited at the hearing on defendant's motion for new trial[5] concerning the propriety of this search was as follows: Patrick Smythe testified that as a parole agent employed by the California Department of Corrections he was assigned to the Special Service Unit of the Department, which provided special parole agents for parolees who have a high potential for violence; that on May 20, 1965

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[4]At the trial it was stipulated by counsel in the presence of the jury that for the purpose of the count charging possession of a firearm by a convicted felon defendant had been convicted of robbery in 1945. Further, a certified copy of the judgment with regard to this conviction was introduced into evidence.

[5]At the time the bullet casing was introduced into evidence defendant objected to its admissibility on the ground that his constitutional rights had been violated. However, the People having made an offer of proof that Dutil went to defendant's hotel room with a parole officer, the trial court ruled that the bullet casing was admissible on the basis that defendant's status as a parolee justified entry into his hotel room. Subsequently, as grounds for a new trial, defendant again urged the inadmissibility of the bullet casing on the dual basis that there was never any evidence introduced at the trial to the effect that Dutil entered defendant's room with the authority or permission of a parole officer and that even if evidence to this effect had been produced, Dutil's entry into defendant's room was illegal. In order to rule properly on defendant's motion for a new trial, the court at this time took evidence on the propriety of the search of defendant's room.

defendant, who was on parole and had a personal parole officer other than Smythe, was classified as a Departmental Interest Case and thus came within the jurisdiction of the Special Service Unit and of Smythe; that on May 20, 1965 Smythe was in the burglary detail of the San Francisco Police Department on a matter unrelated to the instant case and while there received information that defendant had been taken into custody; that based upon the police report which Smythe received, he notified the office of the Director of Corrections and defendant's personal parole officer that defendant had been arrested; that since the police report indicated that two persons had been involved in the offense, it became Smythe's duty to conduct a special investigation to determine if other men under the Department's jurisdiction had been involved in the offense; that in addition Smythe was concerned with whether defendant had violated his parole and also, because of defendant's aggressive profile, whether he had any weapons; that accordingly, Smythe, accompanied by Dutil, went to defendant's hotel room; that while Smythe was searching the closet and bureau drawer, Dutil opened a black attache case which was lying on the bed; and that the spent cartridge case was found in the attache case.

Dutil testified that after Smythe read the police report concerning defendant's arrest, the two discussed the case; that Smythe then indicated that he was going to defendant's room and asked Dutil if he wished to go along; and that Dutil then accompanied Smythe to defendant's room where Dutil found the bullet casing.

Although the trial court upheld the search of defendant's room based on the fact that defendant was a parolee at the time, defendant contends that the "parolee exception" to the general principle that probable cause is required to validate a search without a warrant should not be applicable to a search of a parolee's premises after he has been taken into custody nor in fact to any search of a parolee's residence, and that the exception should not justify a search either by a police officer who accompanies the parole officer or by a parole officer other than the parolee's personal parole officer. Before proceeding to consider these specific contentions we deem it proper to discuss the rules of law pertinent to the search of parolees' premises.

It is well established that although a parolee is entitled to basic rights entitling him to constitutional protection against arbitrary or oppressive official action (see In re Jones, 57 Cal.2d 860, 862 and cases there cited; and see Brown v. Kearney, 355 F.2d 199, 200; Martin v. United States, 183 F.2d 436, 439; United States v. Hallman, 365 F.2d 289, 291) these rights are not necessarily tested by the same rules which apply to citizens who are possessed of full civil rights. (People v. Hernandez, 229 Cal.App.2d 143, 149-150; People v. Denne, 141 Cal.App.2d 499, 507-510; People v. Quilon, 245 A.C.A. 652, 655.)

The rationale underlying this principle is that a parolee is at all times in *custodia legis*. Although he is not a prison inmate in the physical sense, he is serv-

ing the remainder of his term outside rather than within the prison walls. (People v. Quilon, supra; People v. Hernandez, supra.) Accordingly, so far as necessary for the maintenance of parole guardianship, the status of a parolee as a prisoner is no different than that of one who remains in confinement, and, therefore, for the purpose of maintaining the restraints and social safeguards accompanying such status, the correctional authorities who supervise the parolee on parole may subject him, his home and his effects to such constant or occasional inspection and search as may seem advisable to them. (People v. Hernandez, supra; People v. Quilon, supra; People v. Denne, supra; People v. Triche, 148 Cal.App.2d 198, 202-203; People v. Robarge, 151 Cal.App.2d 660, 665-666.)

In the light of the foregoing it has been held that a parole officer needs neither a search warrant nor consent of a parolee in order to search the latter's premises (People v. Denne, supra; People v. Triche, supra; People v. Gastelum, 237 Cal.App.2d 205, 208-209; People v. Quilon, supra), nor is he bound by the requirement of reasonable or probable cause in conducting a search. (People v. Hernandez, supra, pp. 150-151; People v. Quilon, supra, p. 656.) The fact that a person is on parole does not, however, justify a search by peace officers other than parole officers. (People v. Quilon, supra; see People v. Gallegos, 62 Cal.2d 176.) But when a parole officer is justified in making a search he may enlist the assistance of ordinary peace officers. (People v. Quilon, supra; People v. Contreras, 154 Cal.App.2d 321, 326;

see People v. Hernandez, supra; People v. Triche, supra.)

Turning to the instant case we conclude that the specific contentions made by defendant have been answered by the cases which have applied the rules above set out. (As to search of a parolee's residence, see People v. Gastelum, supra, p. 208; People v. Contreras, supra, p. 325; People v. Triche, supra, p. 202; as to search after parolee has been taken into custody, see People v. Gastelum, supra, p. 208; as to legality of search by parole officer when accompanied by a police officer, see People v. Gastelum, supra; People v. Giles, 233 Cal.App.2d 643, 646; People v. Quilon, supra; People v. Contreras, supra, p. 326.) We find no merit, moreover, in the contention that the search was not justified because Smythe was not defendant's personal parole officer. The record discloses that Smythe, as an employee of the Department of Corrections, was a member of a special unit which had jurisdiction over defendant because of his potential for violence; and that Smythe, in conducting a search of defendant's hotel room, was acting in line with department procedures and on behalf of the Department and the Special Service Unit. Thus since the Department of Corrections has the authority to establish the rules, regulations and procedures deemed best suited to carry out the parole system and since Smythe's search of defendant's room was conducted on behalf of the Department and pursuant to these rules and regulations, it is clear that this search was made within the aegis of the rules applicable to parolees hereinabove discussed.

Insufficiency of the Evidence

Defendant contends that the evidence is insufficient to support the verdict as to all counts except that charging him with assault in violation of section 245b. In addition he argues in relation to the charge of a violation of section 12021 that the trial court erred in denying his motion under section 995 to dismiss the indictment as to this charge.[6] Before proceeding to a consideration of the evidence in support of the various convictions involved in this case we note that our determination of the issues raised by defendant in relation to the sufficiency of the evidence must be guided by the principle enunciated in the case of People v. Newland, 15 Cal.2d 678, 681, to the effect that a reviewing court cannot weigh the evidence but must instead assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence and must then determine whether such facts are sufficient to support the verdict. In the light of this rule we conclude that the evidence was sufficient to support the verdict as to the challenged counts upon the following analysis of the evidence.

As to defendant's conviction for robbery of Dr. and Mrs. Riskin and kidnap of Mrs. Riskin for the purpose of committing robbery, he contends that the evidence in the record is insufficient to show that defendant was one of the bandits in the Riskin house.

[6]An order denying a motion to dismiss under section 995 is reviewable on appeal from the judgment of conviction. (*People v. Elliott*, 54 Cal.2d 498, 503.)

In response to this contention it suffices to note the following evidence: Kerlin's identification of defendant as the man whom he had seen leaving the Riskins' residence; the fact that the clothes defendant was wearing when he was apprehended matched the description given by the Riskins of the clothes worn by the bandit with a gun; and the fact that various items belonging to the Riskins were found on defendant's person and in his clothes when he was apprehended. Defendant contends, however, that Kerlin's identification of defendant as the man involved in the Riskin robbery was discredited. The basis of this contention is that although Kerlin testified that the man who ran from the Riskin house had a thick growth or shadow beneath his nostrils, a photograph of defendant taken on May 20, 1965 shows him with a pencil-thin mustache. Despite this apparent discrepancy between Kerlin's description of the robber and the photograph of defendant, the fact remains that immediately after defendant's apprehension he was identified by Kerlin as one of the men at the Riskin house. The strength of this identification in light of the photograph of defendant which was introduced into evidence was clearly a determination to be made by the jury. (People v. Primo, 121 Cal.App.2d 466, 468; People v. Addington, 43 Cal.App.2d 591, 593.) On appeal we must assume that the jury believed Kerlin's identification of defendant as the man he had seen leaving the Riskin residence.

Turning now to the claim made by defendant as to the insufficiency of the evidence to support defend-

ant's conviction on the charge of kidnapping to commit robbery, we note that he argues that Mrs. Riskin moved voluntarily and that therefore her movement was not without free will and consent and thus not a kidnap under either section 207 or 209.[7] In support of this argument defendant refers to the fact that when the bandits asked Marilyn to take them upstairs to the money and jewels, Mrs. Riskin stated that she would go and then proceeded to follow one of the men upstairs. Defendant, however, overlooks the testimony of Mrs. Riskin to the effect that after she had gone part way up the stairs she turned around and looked at her husband and daughter-in-law, at which point the man with the gun waved his gun and said "Come on, come on," causing Mrs. Riskin to continue up the stairs. This testimony is susceptible to the inference that Mrs. Riskin's ascent up the stairs was actuated by fear and that her fears were justified. As stated in People v. Dagampat, 167 Cal.App.2d 492, 495, "The gravamen of the offense of kidnaping is some form of compulsion. [Citation.] The requisite force or compulsion need not consist of the use of actual physical force or of express threats; the taking is forcible where it is accomplished through the giving of orders which the victim feels compelled to obey because he fears harm or injury from the accused, and his apprehension is not unreasonable under the circum-

[7]Kidnapping is defined in section 207 as follows: "Every person who forcibly . . . takes . . . any person in this state, and carries him . . . into another part of the same county . . . is guilty of kidnaping." Section 209 provides for an increased punishment for "any person who kidnaps or carries away any individual to commit robbery, . . ."

stances. [Citations.]" (See also People v. De Georgio, 185 Cal.App.2d 413, 422.)[8]

With regard to the conviction for possession of a firearm in violation of section 12021, defendant argues that the momentary possession of a gun which was admitted by defendant should not constitute the requisite possession to support a conviction under this section, and that since the circumstantial evidence of defendant's possession of the gun was discredited, there is not substantial evidence to support defendant's conviction on this charge. As to the latter point defendant refers again to the discrepancy between Kerlin's description of the man whom he saw leaving the Riskin house and the photograph taken of defendant on May 20, 1965. Also defendant contends that someone other than defendant must have been in possession of the attache case in which Dutil found the bullet casing in defendant's hotel room, since if it had been there when Officer Sullivan searched the room on the previous evening "he would have seen it and most likely have inspected it." We have already stated that the strength of Kerlin's identification of defendant as the man whom he previously saw leaving the Riskin house is to be determined by the jury. Similarly the question of whether the attache case containing the bullet casing belonged to defendant or was put in defendant's hotel room by

[8]In addition to urging insufficiency of the evidence to support his conviction for a violation of section 209, defendant contends that this section is unconstitutional. The constitutionality of this section has, however, been upheld in People v. Wein, 50 Cal.2d 383, 400, and People v. Norman, 177 Cal.App.2d 59, 66.

someone else was also for the jury's determination. This court must assume that the jury resolved these questions against defendant and in favor of the verdict. Thus defendant's conviction for possession of a firearm is supported not only by the same evidence which tended to show that defendant was the man who carried a gun during the robbery at the Riskin house and by the fact that a gun was found at the spot where defendant was ultimately apprehended by the police, but also by the fact that, according to the criminologist, the bullet casing which was found in defendant's hotel room was fired by the gun found in the yard at 1241 Shrader Street. Moreover, since these pieces of evidence support an inference that defendant was the man in the toggle coat who held a gun during the robbery of the Riskins we need not consider whether a momentary possession of a gun in the manner testified to by defendant would support a conviction under section 12021.

Adverting to defendant's contention that in response to his motion pursuant to section 995, the charge of a violation of section 12021 should have been dismissed from the indictment because the evidence submitted to the grand jury did not show probable cause to return an indictment as to this charge, it suffices to say that since all of the evidence which we have outlined above as constituting substantial evidence in support of defendant's conviction for possession of a firearm was presented at the grand jury hearing as well as at the trial, it is apparent that the grand jury had probable cause to return an indict-

ment charging defendant with a violation of section 12021.

Alleged Errors in Instructing the Jury

Defendant's first contention concerning error in the giving of instructions is that the trial court should have instructed that voluntary movement by the victim is a defense to a charge of kidnapping to commit robbery. The record does not indicate that such an instruction was requested. However, defendant argues that the trial court was required to give such an instruction on its own motion. With regard to the duty of the trial court to so instruct, the law is clear that the court is required on its motion to give instructions on the general principles of law governing the case. (People v. Morse, 60 Cal.2d 631, 656; People v. Wade, 53 Cal.2d 322, 334.) In the instant case the trial court adequately discharged this duty by giving an instruction which defined kidnapping for the purpose of committing robbery in terms of "a carrying or a forcible moving for some distance of a person who, *against his or her will,* is taken into the custody or control of another person, . . ." (Emphasis added.)

Defendant's second contention concerning error in the instructions is that the trial court failed to admonish the jury that they were to disregard a newspaper clipping which, although marked for identification, was subsequently ruled inadmissible as evidence and that the court further failed to admonish the jury to disregard statements of the prosecutor and testimony of a witness concerning this clipping.

The statements of the prosecutor to which defendant has reference occurred at the commencement of the trial. In her opening statement the prosecutor first stated that Mrs. Riskin would testify that she had made an attempt on her life and that her attempted suicide had been the subject of a newspaper article. Subsequently the prosecutor stated that Officer Sullivan would testify that he went to defendant's hotel room; that he found a newspaper clipping concerning Mrs. Riskin's suicide attempt; that the clipping gave the Riskins' address; and that written at the top of the clipping were the words "Near Haight and Stanyan." During the examination of Mrs. Riskin the newspaper clipping was marked for identification. At this time Mrs. Riskin confirmed that the clipping concerned her and further testified that the handwriting referring to Haight and Stanyan was neither hers nor her husband's. No objection was made by defense counsel to either of these references to the newspaper clipping. However, when Officer Sullivan testified that he and another officer had gone to defendant's hotel room at approximately 11:00 p.m. on May 19, 1965, defendant objected to any further testimony of the officer on the ground that an illegal search had been made. At this point the jury was excused and a voir dire examination conducted. The trial court then ruled that no evidence concerning the newspaper clipping could come in. Accordingly, no further mention of the clipping was made during the trial.[9]

[9]Although at the conclusion of the People's case People's Exhibits One through Fifteen, previously marked for identification, were admitted into evidence on motion of the prosecution, it is

As to defendant's contention that the trial court should have admonished the jury to disregard the clipping, the record reveals that the trial court, both before and after the presentation of evidence, made numerous admonitions to the jury to the effect that they were to disregard any evidence which, although initially admitted, was ultimately stricken from the record. Similar admonitions to the effect that the jury was to disregard statement of counsel were also given. And finally, as to defendant's contention that the jury should have been instructed to disregard the testimony of Mrs. Riskin concerning the newspaper clipping, since no objection was made to this testimony nor was a motion made to strike it, the trial court was under no obligation to admonish the jury to disregard this testimony.

Comment by the Trial Court

While instructing the jury, the trial court made a comment to the effect that in its opinion, based on the evidence, defendant's guilt on each charge of the indictment had been proved beyond a reasonable doubt. In addition the trial court admonished the jury that the court's opinion as to defendant's guilt was in no way binding upon the jury, whose province it was to resolve all questions of fact and determine

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clear that the newspaper clipping, which had been marked as People's One, was not intended to be included in the group of exhibits which were admitted into evidence. Thus, we note the statement of the trial court, made following jury instructions and out of the presence of the jury, that "The record will show that exhibit marked People's 1 will not be taken to the Jury Room."

the credibility of the witnesses.[10] The giving of an identical comment was held to be erroneous and to constitute prejudicial error in the recently-decided case of People v. Brock, 66 A.C. 672, 676 and 682 upon the rationale that such an instruction prevented the jury from properly considering the case in that it provided "for the jury a means to avoid the preliminary determinations called for by the instructions of the law and instead to rely on the words of the judge in returning a conviction." (P. 678.)

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[10]The exact comment made by the trial court is as follows: "By the constitution of this state, a Judge of this Court presiding at the trial of a criminal action is authorized, within proper bounds, to comment on the evidence and testimony and the credibility of any witness.

"It is the opinion of this court based upon the evidence in this case that the defendant, Leonard Thompson, has been proved beyond a reasonable doubt to be guilty of each of the charges of the indictment. The charges of the indictment, now, are Count One, charges him with kidnapping to commit robbery, a violation of 209 of the Penal Code; Counts Two and Three charge the defendant with robbery against Mrs. Riskin and Dr. Riskin, respectively. Count Four charges the defendant with an assault with a deadly weapon upon a peace officer, and Count Five charges him with possession of a firearm capable of being concealed upon the person while at a time when the defendant had been previously convicted of a felony. Now, I caution you that it is your right and your duty to exercise the same independence of judgment in weighing my comment on the evidence as you are entitled to exercise in weighing the testimony of any witness and the arguments of counsel.

"You will keep in mind that you are the exclusive judges of the credibility of the witnesses and of all questions of fact submitted to you. Such authority as the trial judge has to express his personal thoughts on any of these matters is confined to the sole purpose in aiding you in arriving at a verdict and may not be used, and is not used in this case, to impose his will upon you or to compel a verdict."

Denial of Effective Assistance of Counsel

Defendant argues that he was denied the effective assistance of counsel, but as we understand this argument he does not contend that the errors alleged to have been made by counsel were sufficient to reduce the trial to a farce or a sham. Rather he argues that a denial of the right to effective assistance of counsel should be held to exist "where it can be said that in absence of the errors, omissions, or other adverse tactics of counsel, it is reasonably possible that a more favorable result would have been obtained." The law, of course, is clear that a defendant has not been denied the effective assistance of counsel as guaranteed by the Constitution except in cases where counsel's lack of diligence or competence reduces the trial to a farce or a sham. (People v. Reeves, 64 Cal.2d 766, 774; People v. Jolke, 242 Cal.App.2d 132, 140.) Moreover, defendant has the burden of establishing his claim of ineffective assistance of counsel as demonstrable reality, not as a matter of speculation. (People v. Reeves, supra, at p. 774.)

In support of his argument that he was denied effective assistance of counsel defendant cites the following examples: (1) The failure to question Bradley Thomas concerning the knife used to assault Gerrans; (2) the failure to argue to the jury that Mrs. Riskin consented to accompany the bandit upstairs in her house; and (3) the failure to request an instruction on consent as a defense to the section 209 violation. We deem it unnecessary to discuss each of these points individually because, while in the

light of hindsight it might have been advantageous for defense counsel to have pursued such avenues of questioning and argument and to have requested the referred-to-instructions, the failure to do so in no way reduced defendant's trial to a farce or sham. Moreover, our examination of the record reveals that defendant was vigorously and competently represented by counsel. We conclude, therefore, that there is no merit to defendant's argument that he was denied the effective assistance of counsel.

Conclusion

A recapitulation of the foregoing discloses no error excepting that involving the trial court's comment on defendant's guilt. In *Brock,* supra, the Supreme Court, although holding that the error there constituted prejudicial error, recognized that a comment on guilt is not necessarily prejudicial per se. We refer to the Supreme Court's application of the California harmless-error rule in reaching this conclusion upon the basis that the evidence was not overwhelming. It is thus apparent that the Supreme Court not only deemed that such error did not violate any federal constitutional right, but also declined to follow the more rigid federal rule that it is improper for a trial judge to state that he believes the defendant guilty, unless the undisputed evidence establishes guilt.[11]

[11]The Supreme Court in People v. Brock, supra, 66 A.C. 672 approved our decision in People v. Williams, 235 Cal.App.2d 389, 402-403, wherein we upheld a comment on guilt, on the basis that the comment in *Williams* was made in accordance with the federal rule.

(See United States v. Murdock, 290 U.S. 389, 393-394; United States v. Woods, 252 F.2d 334, 336 [and cases cited].)

Although the evidence in the instant case was essentially circumstantial, we deem it to be overwhelming. In our opinion the evidence presented by the prosecution, when weighed against the defendant's defense which consisted solely of his own tenuous testimony as to his presence in the vicinity of the Riskin home immediately after the robbery and his possession of the gun in question, is tantamount to evidence which undisputably establishes defendant's guilt. Accordingly, notwithstanding the erroneous comment on guilt, we conclude, upon an examination of the record in this case, that it cannot be said that there was a miscarriage of justice, since it is not reasonably probable that a result more favorable to defendant would have been reached in the absence of the error. (People v. Watson, 46 Cal.2d 818, 836; Cal. Const., art. VI, § 13.)

The judgment is affirmed.

Molinari, P. J.

We concur:

Sims, J.

Taylor, J.*

Filed June 28, 1967,
Lawrence R. Elkington, Clerk.

*Justice of the Court of Appeal of the State of California, First Appellate District, Division Two, sitting pro tempore under assignment by the Chairman of the Judicial Council.

Appendix II

Order Due September 26, 1967

ORDER DENYING HEARING

After Judgment by the Court of Appeal
First District, Division One, Crim. No. 5473

In the Supreme Court of the State of California

In Bank

People of the State of California,
Plaintiff and Respondent,

vs.

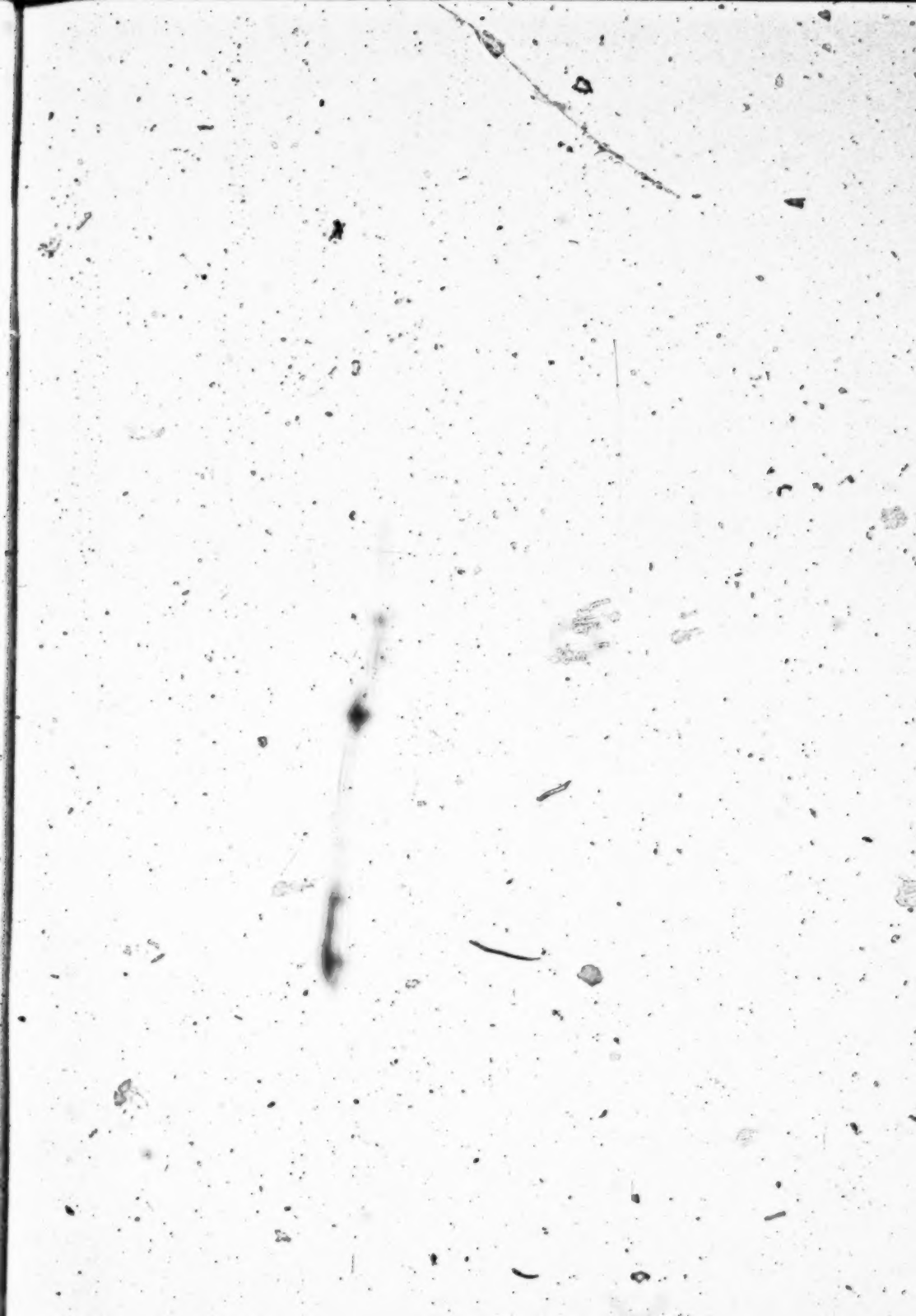
Leonard Thompson,
Defendant and Appellant.

Appellant's petition for hearing denied.

Peters, J., is of the opinion that the petition should be granted.

Peters, Acting Chief Justice

Filed Sept. 21, 1967,
William I. Sullivan, Clerk.



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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1967

No. 1068

LEONARD THOMPSON,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Court of Appeal of the State of California, First Appellate District, Division One, was filed on June 28, 1967, and is reported in *People v. Thompson*, 252 A.C.A. 76, 60 Cal.Rptr. 203 (1967). The opinion is reproduced in Appendix I of the Petition for Writ of Certiorari. Petitioner's petition for hearing in the Supreme Court of the State of California was denied on September 21, 1967.

JURISDICTION

Jurisdiction is invoked under 28 U.S.C. 1257 (3). However, the questions sought to be presented here were neither raised in nor ruled on by the court below, and there has been no compliance with Rule 23(1)(f), Revised Rules of the Supreme Court. Therefore, jurisdiction should be declined.

QUESTIONS PRESENTED

I

Whether the right to trial by jury in state criminal proceedings is guaranteed by the Fourteenth Amendment.

II

Whether the trial judge's comment on the evidence is a deprivation of the right to trial by jury.

III

Whether the trial judge's comment on the evidence is a deprivation of the right to an impartial jury.

IV

Whether such comment, if error, is prejudicial.

STATEMENT OF THE CASE

Following trial by jury, petitioner was convicted of kidnapping for the purpose of robbery (Calif. Pen. Code § 209); assault with a deadly weapon on a peace officer (Calif. Pen. Code § 245b); possession of a firearm by a

convicted felon (Calif. Pen. Code § 12021); and two counts of robbery (Calif. Pen. Code § 211).

The facts adduced at trial in this case are as follows:

Shortly before 10:00 p.m. on May 19, 1965, Dr. and Mrs. Alexander Riskin were present in their home, 120 Belgrave, San Francisco. With them was their daughter-in-law, Marilyn, who at this time was talking by telephone to her husband, Stephen Riskin, in Los Angeles (RT 33).

In response to the ringing of the front door bell, Mrs. Riskin came down the stairs from her bedroom and opened the door (RT 34). As she did so, Dr. Riskin, who had followed her down the stairs, observed her switching on the porch light which went off almost immediately, and opening the door (RT 75). Two men pushed their way into the house. The first man to come in wore a dark green toggle coat with a ski mask over his face, and carried a gun (RT 34, 36, 75, 76, 78). The second man wore no mask at this time, and carried a large knife (RT 36, 76).

As the men entered, Mrs. Riskin started screaming (RT 34, 76). The man with the gun said, "Shut up; shut up or I will kill you," but she continued to scream (RT 34:23-25). The man then put his hand over her mouth and pushed her to the floor. He also told Dr. Riskin to sit down on the floor (RT 35, 76). Dr. Riskin asked the men not to hurt her because she was just home from the hospital. One of the men replied, "We know all about it. We saw it in a newspaper and that is why we are here." (RT 37:4-10). The man with the knife admonished them, "Don't look up; don't look up." (RT 37:24; 76:26). During this time Marilyn informed her husband about the robbery. He then called the San Francisco police (RT 137-38).

One of the men then went into the living room, came back with Marilyn, and put her down on the floor next to Dr. and Mrs. Riskin. At this time the second man also had a mask on (RT 38, 76, 77). The second man told them that the first man was dangerous, "Don't cross him. He needs a fix. Have you got any morphine?" (RT 79:25-26).

The men then asked where the money and the jewels were (RT 38). Mrs. Riskin replied, "Upstairs in the bedroom." (RT 39:2). The man pointed the gun at Marilyn and told her to go up and show him. Mrs. Riskin testified:

> "I said, 'She is just a visitor. She doesn't know where anything is. This is my house and, I know where it all is. I will go,' and I got up and he was a couple of steps up ahead of me, and I started up. And our stairs go around like this (indicating), and when I got to the curve, I turned around and looked down and saw my husband and Marilyn sitting on the floor and the man with the knife standing over them, and the man with the gun who was ahead of me on the stairs said, 'Come on, come on,' waving the gun, and so I turned and followed him up the stairs. And we went into the bedroom." (RT 39:9-20). See RT 52.

In the bedroom, the man took some items from Dr. Riskin's trousers, including his little pocket knife, his watch, keys, and some bills from a wallet and put them in his pockets. During this time Mrs. Riskin was extremely upset, "rather hysterical." (RT 40). They then went downstairs to the dinette where the man took some change from Mrs. Riskin's purse, went from there to the living room, then back to the entry where Mrs. Riskin again had to sit on the floor with her husband and daughter-in-law (RT 41-42).

At this time there was a knock on the door. Marilyn asked, "Who is it?" When the answer was, "Police," the men said, "Don't open the door." (RT 42:23-25). Marilyn opened the door, and the police came in as the two men ran out the door toward the back (RT 43).

On the night of May 19, 1965, at about 10:00 o'clock, Officers Frank G. Kerlin and Burt Olsen of the San Francisco Police Department were assigned to a radio car. They received a call that there was a burglary in progress at 120 Belgrave (RT 83). As the officers arrived, they checked the address with communications, then went to the front door and rang the doorbell. There seemed to be some confusion, then a voice stated "See who it is," and a female voice asked, "Who is it?" When the officers replied "Police," a shouting male voice said to get away from the door (RT 84).

The officers then banged on the door and demanded entrance. The door opened and a young woman ran past them. The officers went into the hallway and observed the doctor and his wife lying on the floor. Standing in the doorway, eight to ten feet away from them, was a man wearing a blackish-green jacket with light-colored buttons, with a hood over his head. As he saw the officers, he dropped the knife he was carrying and ran through the door (RT 85, 106-07). Mrs. Riskin shouted, "He has got a gun. He will kill you. Be careful. He will kill you." (RT 85:16-18).

Officer Kerlin followed the man through the door, about twenty feet behind him. As he rounded the doorway he saw the man at the foot of the stairs; the man who had pulled the hood off looked back toward the officer. Officer Kerlin observed that he was a Negro with a thick growth or

shadow beneath his nostrils. He shouted twice at him to halt or he would shoot, and as the man ran through the trees, the officer fired a shot after him (RT 87, 109-10).

Officer Kerlin then told his partner that they would follow the suspect in the police car. Officer Olsen stayed with the Riskins while Officer Kerlin returned to the car and went down Shrader Street (RT 88). He advised communications that he was in pursuit of the robbery suspect (RT 89). He observed the suspect running, but lost him in the vicinity of Shrader and Alma Streets. As he stopped at this intersection after driving around the block without again seeing the suspect, Officers Clark and Gerrans arrived (RT 90).

These two officers were on duty in a radio car and heard Officer Kerlin's report to communications (RT 121). They proceeded towards Shrader and Alma when they heard the suspect had been lost in that area (RT 122). After learning from Officer Kerlin that the suspect possibly went in the schoolyard (RT 123), Officer Gerrans went around the outside of the school, while Officer Clark went into the schoolyard (RT 124, 142). Both officers were in uniform (RT 125, 141).

As Officer Gerrans went into the backyard of 1257 Shrader in the course of this search, he heard a rustling noise in the bushes. Proceeding further, using his flashlight, he saw peering at him a person who then went into the front yard at 1241 Shrader. Officer Gerrans called out to him that it was the police and to come out with his hands up (RT 124, 143). The officer then put both his gun and flashlight away and climbed the wire fence that separated the yards at 1257 and 1241 Shrader Street (RT 125). As he took his

flashlight out and shined it over the bush area, petitioner came out (RT 126). In the meantime Officer Clark had also climbed the fence into the yard (RT 143).

Petitioner carried a knife and lunged at Officer Gerrans, cutting him on the left hand. At this time the officer had his flashlight in his right hand, but had not had the opportunity to take his gun from his holster. The officer and petitioner fell to the ground. During the scuffle, both officers struck petitioner and eventually were able to put handcuffs on him (RT 128, 143). Petitioner was wearing a dark green toggle jacket, identified at trial as the type of coat worn by the first of the two men who forced their way into the house (RT 36, 144).

The officers then led petitioner out of the yard and brought him to the police car. Officer Kerlin walked over to the car, and identified petitioner as the man he had observed on the stairway because he had on the greenish black jacket with the toggle buttons, was a Negro, and had a thick mustache underneath his nostrils (RT 91-92).

Petitioner was placed in the police car (RT 93). Then, observing petitioner squirming around in the back seat of the car, the officers considered the possibility that a gun had been concealed and pulled him from the car (RT 94). Two ladies' rings, a pair of men's cuff links, some money and a metal key ring and keys were found on and beneath the seat from which petitioner had been taken (RT 94, 144-46). The jewelry and keys were identified as the Riskins' (RT 55-57, 77-78).

Officer Clark searched petitioner and found a number of objects identified at trial as those taken from the Riskin house (RT 55-57, 77-78): a leather key case with three keys,

a pocket knife marked, "Riskin", a necklace and some bills were found in petitioner's trousers pocket; a watch was found on his wrist (RT 144-46, 147). Later that night, Officer Kerlin returned to the yard and found a pair of gloves at the spot the struggle with petitioner took place (RT 130). He saw no other objects in the yard (RT 133).

Bradley Thomas, a 10-year-old boy who lived at 124 Shrader Street had observed the capture of petitioner from inside his home (RT 69-70). The next day, May 20, 1965, playing in his yard, he found a loaded gun with its barrel pointed into the ground, then called the police (RT 65-66). In response to Bradley's call, Officer Kerlin and three other officers went to the yard and took the gun. Bradley had also found a cigar, a cigarette butt and an officer's pen, but did not find any items of men's clothing in the yard (RT 68).

Also on May 20, 1965, Inspector Emile Dutil of the San Francisco Police Department went to petitioner's hotel room, Room 24 of the Ascot Hotel on Market Street, (RT 60), and found a .38 colt bullet casing in an attache case which was lying on the bed (RT 192-93). Charles Fontan, a criminologist in the San Francisco crime laboratory testified that in his opinion, after tests, the bullet casing had been fired by the gun found in the yard at 1241 Shrader Street (RT 202-03, see RT 195-203).

Petitioner himself was the only witness for the defense. He testified that he had never been in the Riskin home (RT 211). He stated that he was in the area because he was supposed to meet a man named James Bensen in a bar on Carl Street (RT 227). As he was looking for Bensen, a man ran by and threw the coat down (RT 228). Petitioner picked up the coat because it was better than his, then went

into the yard at Shrader Street to try on the coat, taking off his own jacket to do so. He felt a gun in the pocket, took it out and threw it in the bushes (RT 213). He heard cars, then hid in the bushes because he was scared (RT 214). He stated that when the flashlight was pointed at him he put his hands over his head and came out (RT 215). The officers made him kneel down and pushed his face in the mud (RT 218), then struck him in the mouth breaking the wire in his false teeth. This wire cut his mouth and the officer's hand (RT 219). He also stated that the officers hit him several times in the yard and again at the police station (RT 220, 223).

After all the evidence had been presented, the judge included in his charge to the jury the following comment:

> "By the constitution of this state, a Judge of this Court presiding at the trial of a criminal action is authorized, within proper bounds, to comment on the evidence and testimony and the credibility of any witness.
>
> "It is the opinion of this court based upon the evidence in this case that the defendant, Leonard Thompson, has been proved beyond a reasonable doubt to be guilty of each of the charges of the indictment. The charges of the indictment, now, are Count One, charges him with kidnapping to commit robbery, a violation of 209 of the Penal Code; Counts Two and Three charge the defendant with robbery against Mrs. Riskin and Dr. Riskin, respectively. Count Four charges the defendant with an assault with a deadly weapon upon a peace officer, and Count Five charges him with possession of a firearm capable of being concealed upon the person while at a time when the defendant had been previously convicted of a felony.

Now, I caution you that it is your right and your duty to exercise the same independence of judgment in weighing my comment on the evidence as you are entitled to exercise in weighing the testimony of any witness and the arguments of counsel.

"You will keep in mind that you are the exclusive judges of the credibility of the witnesses and of all questions of fact submitted to you. Such authority as the trial judge has to express his personal thoughts on any of these matters is confined to the sole purpose in aiding you in arriving at a verdict and may not be used, and is not used in this case, to impose his will upon you or to compel a verdict." (RT 258).

SUMMARY OF RESPONDENT'S ARGUMENT

Petitioner was convicted by the unanimous verdict of a twelve-man jury. On appeal, the court found error under California law in the comment of the judge that, in his opinion, based on the evidence, petitioner had been proved guilty beyond a reasonable doubt. The error was considered harmless, under the California Constitution, because the evidence was overwhelming. No federal constitutional issue was raised or decided at trial or on appeal. We submit that petitioner has not met the burden of establishing the jurisdictional prerequisite for review by this Court.

Petitioner's arguments that the judge's comment infringed a federal constitutional right to a jury trial and right to an impartial jury are without merit. This Court has consistently held that a right to trial by jury in criminal proceedings is not so fundamental and essential to a fair trial that it is applicable to the states through the Four-

teenth Amendment. It cannot logically be said that a common law jury is the only fair method of adjudicating guilt. The only reason advanced for applying such a right to state criminal proceedings is that it is contained in the Sixth Amendment. This argument overlooks not only the fact that the due process standard is a fair trial, not the Sixth Amendment, but the obvious difference between the Sixth Amendment's guarantee of the incidents of a fair trial and the Third Article's guarantee of jury trial. To hold that a jury trial is essential to due process would promote not fundamental liberty but arbitrary rigidity.

Moreover, the comment complained of does not infringe upon the right to a jury trial. Comment on the evidence is as essential an incident of the common law jury trial as twelve men and a unanimous verdict. There has been no infringement of the right to trial by an impartial jury because the comment complained of relates only to the relationship between judge and jury.

Finally, even if the comment is error under the federal constitution, it was harmless in this case, not just beyond a reasonable doubt but to a near certainty. Evidence of guilt was tantamount to undisputable. Thus, the issuance of a writ of certiorari to review this case could afford no relief to this petitioner even if the constitutional issue is decided as he urges.

ARGUMENT

Petitioner was convicted by the unanimous verdict of a twelve man jury in accordance with the California Constitution which, in Article I, section 7, provides:

> "The right of trial by jury shall be secured to all, and remains inviolate; but in civil actions three-fourths of the jury may render a verdict. A trial by jury may be waived in all criminal cases, by the consent of both parties, expressed in open court by the defendant and his counsel, and in civil actions by the consent of the parties signified in such manner as may be prescribed by law. In civil actions and cases of misdemeanor, the jury may consist of 12, or of any number less than 12 upon which the parties may agree in open court.[1]

The California Constitution also provides:

> "The court may instruct the jury regarding the law applicable to the facts of the case, and may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the case. The court shall inform the jury in all cases that the jurors are the exclusive judges of all questions of fact submitted to them and of the credibility of the witnesses." Art. VI, § 19 (now Art. IV, § 10).

Pursuant to this provision, the trial judge commented on the evidence as quoted in the statement of the case. On appeal, the Court of Appeal found this comment to be error in accordance with *People v. Brock*, 66 Cal.2d 645, 649-55, 58 Cal.Rptr. 321, 426 P.2d 889 (1967), decided by the California Supreme Court while the instant appeal was pend-

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[1]Offenses not felonies are misdemeanors in California. Calif. Pen. Code § 17. Since there are no "petty offenses," the right to jury trial in California is more extensive than that right in the federal system.

ing. The court, however, affirmed the conviction in the instant case under the California harmless error rule on the basis that the evidence, although "essentially circumstantial," was overwhelming and, in view of the defense made, "tantamount to evidence which indisputably" established guilt.[2]

On these facts, petitioner now urges that the comment of the court was a deprivation of his right to jury trial and that this right is guaranteed under the Fourteenth Amendment. In addition, he argues that the comment deprived him of a trial by an impartial jury. Therefore, the argument continues, the court erred in affirming the conviction because such error is either prejudicial *per se* or not harmless under the federal standard set forth in *Chapman v. California*, 386 U.S. 18 (1967). In our view, all of these contentions are not only without merit, they are not properly before this Court because they were not raised, argued or decided in the state court proceedings.

I

JURISDICTION SHOULD BE DECLINED.

This Court has jurisdiction to review cases arising in the state courts only when a "title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of . . . the United States." 28 U.S.C. 1257(3). Rule 23(1)(f) of the Revised Rules of the Su-

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[2] "[I]t cannot be said that there was a miscarriage of justice, since it is not reasonably probable that a result more favorable to defendant would have been reached in the absence of the error. *(People v. Watson*, 46 Cal.2d 818, 836; Calif. Const., Art. VI, § 13)."

preme Court provides that the petition for writ of certiorari, in the statement of facts, must specify the stage and method of raising the federal issues and the way in which they were passed on by the state courts. This petitioner has completely failed to do; and indeed cannot do for obvious reasons.

First, no objection to the comment was made in the trial court. Secondly, on appeal, the allegation of error was made on the basis that this comment was error under California law, because it could have been considered by the jury to be an advised verdict. The only reference to federal constitutional law was the oblique suggestion that comment on the evidence was cast into doubt by this Court's decision in *Griffin v. California,* 380 U.S. 609 (1965) (comment on defendant's failure to testify), largely because both kinds of comment were authorized by the same provision of the California Constitution.[3]

While the appeal in this case was pending, the California Supreme Court issued its opinion in *People v. Brock, supra,* ruling that the identical comment at issue here was not authorized by the state constitution because:

> "Rather than aiding the jury in properly considering the case, such a comment may prevent it from doing so." *Id.* at 651.

While the court in *Brock* reviewed federal law on comment, citing, *inter alia, United States v. Murdock,* 290 U. S.

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[3]Only in his petition for hearing in the California Supreme Court did petitioner specifically raise a question of deprivation of a right to trial by jury under the federal constitution. This, of course, is too late for the purpose of establishing jurisdiction in this Court since the State Supreme Court denied the petition and thus did not reach the merits of the questions raised.

393 (1933), the decision was not based on federal constitutional law, nor was there any discussion of the Sixth and Fourteenth Amendments.[4]

Thus, in accordance with the decision in *Brock*, the Court of Appeal found the comment to be error in the instant case, but in the circumstances, non-prejudicial. In reaching this decision, the Court of Appeal stated:

> "In *Brock, supra*, the Supreme Court, although holding that the error there constituted prejudicial error, recognized that a comment on guilt is not necessarily prejudicial *per se*. We refer to the Supreme Court's application of the California harmless-error rule in reaching this conclusion upon the basis that the evidence was not overwhelming. It is thus apparent that the Supreme Court not only deemed that such error did not violate any federal constitutional right, but also declined to follow the more rigid federal rule that it is improper for a trial judge to state that he believes the defendant guilty unless the undisputed evidence establishes guilt." (footnote omitted).[5] See Appendix I to Petition at xxii.

Since no federal constitutional error was discussed or decided in *Brock* nor raised in *Thompson*, it is not surprising that the Court of Appeal "deemed that such error did not violate any federal constitutional right." We respectfully submit that the record and the petition are completely inadequate to establish jurisdiction in this Court, and that jurisdiction should therefore be declined.

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[4]In *Brock*, the conviction was reversed because the comment was considered prejudicial in the circumstances of the case.

[5]We believe this interpretation of federal law to be erroneous, as we will discuss *infra*.

II

THE RIGHT TO A JURY TRIAL IS NOT ONE OF THOSE RIGHTS "FUNDAMENTAL AND ESSENTIAL TO A FAIR TRIAL" APPLICABLE TO THE STATES THROUGH THE FOURTEENTH AMENDMENT.

This Court has consistently reiterated the view that the right to trial by jury is not one of those rights so fundamental to a fair trial that it is applicable to the states through the Fourteenth Amendment. See *Irvin v. Dowd*, 366 U.S. 717, 721 (1961); *Fay v. New York*, 332 U.S. 261 (1947); *Snyder v. Massachusetts*, 291 U.S. 97 (1934); *Maxwell v. Dow*, 176 U.S. 581, (1899). In *Palko v. Connecticut*, 302 U.S. 319 (1937), the court stated:

> "The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' [citations omitted]. Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them. . . .
>
> "We reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over from the earlier articles of the Federal Bill of Rights and brought within the Fourteenth Amendment by a process of absorption. These in their origin were effective against the federal government alone. If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed."

Despite these clear and consistent statements, petitioner argues that in *Parker v. Gladden*, 385 U.S. 363 (1966), this Court overruled *Maxwell, sub silentio*, and "held that the Sixth Amendment guarantee of trial by jury applies to criminal proceedings." (Pet. at 10). He urges that in light of the decisions subsequent to *Maxwell* which have made applicable to the states all the other specific guarantees of the Sixth Amendment, it would have been curious indeed if the Sixth Amendment guarantee of jury trial were the only particular in the Sixth Amendment not applicable to state court criminal proceedings." (Pet. at 11).

In our view, petitioner has not only misread *Parker v. Gladden, supra*, but has misinterpreted the import and function of the Sixth Amendment.

In *Parker v. Gladden, supra*, this Court held that a defendant in a state court had the right to be tried by an impartial jury, not that he had a right to choose a jury trial. This holding merely follows prior cases[6], and is fully consistent with the cases cited by petitioner, (Pet. at 11), finding that other specific guarantees of the Sixth Amendment were so fundamental and essential to a fair trial that they are incorporated in the Fourteenth. We submit, however, that it does not follow from this that a state defendant is entitled to choose a jury as the trier of fact.

The guarantees of the Sixth Amendment have been applied to the states through the due process clause of the Fourteenth Amendment not because they are found in the Sixth Amendment, but because they are essential to a fair trial. See *e.g., Pointer v. Texas*, 380 U.S. 400, 403 (1965).

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[6]See, *e.g., Irvin v. Dowd, supra; cf., Tumey v. Ohio*, 273 U. S. 510 (1927).

A defendant is entitled to fairness and due process in a trial even for petty offenses, but in the federal system he is not entitled to a jury. See *Cheff v. Schnackenberg*, 384 U.S. 372 (1966). It can hardly be disputed that the right to confront witnesses, and the right to an impartial judge or jury are essential elements of fairness and have a direct relevance to the integrity of the fact finding process. Where, however, is the intrinsic or logical superiority of a group of twelve laymen as compared to any other number of laymen or to a trained judge or panel of experts?

We are not disputing either the value or the importance of the jury as a traditional concept in Anglo-American justice.[7] California preserves the right to trial by jury more completely than does the federal system. However, if one were to devise *de novo* a system of justice it could not reasonably be said that a lay jury is essential to fairness. Moreover, it would be difficult on a logical basis to justify as the only possibility the common law jury of twelve, the unanimous verdict, or even the traditional divisions of function between the judge and jury.

Petitioner urges that "the fact that [a] right appears in the Sixth Amendment of our Bill of Rights reflects the beliefs of the framers of those liberties and safeguards that [it is] a fundamental right essential to a fair trial in a criminal prosecution." *Pointer v. Texas*, 380 U.S. 400, 404 (1965) (See Pet. at 12). In the constitutional scheme,

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[7]This value, however, is subject to debate. See, *e.g.*, Sebille, *Trial by Jury, an Ineffective Survival*, 10 Am. Bar. J. 53 (1924); Kalven & Zeisel, *The American Jury* 3-11 (1966). Moreover, recent decisions of this Court have suggested an increasing distrust of the jury. See *Jackson v. Denno*, 378 U.S. 368, 405, 430 (1964), (dissenting opinions).

however, it is not the Sixth Amendment which guarantees the jury trial as the method of trying facts in the federal system, but Article III, section 2, clause 3 of the Constitution itself. The meaning of the Sixth Amendment in this framework is clearly to specify the incidents of that trial essential to insure fairness.

Article III, section 2 of the United States Constitution establishes the jurisdiction of United States Courts. Clause 3 of that section provides:

> "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed."

The Sixth Amendment to the Constitution establishes the incidents of this trial as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Reading these provisions together, it seems obvious that the right established in the Sixth Amendment in regard to jury trial, was that the jury be both impartial and local. The word "jury" was used, not to repeat a guarantee already made, but because no other form of trial was con-

templated in the federal courts[8] and the first ten amendments as enacted were restrictions only on the federal government. It is significant that no other "right" is duplicated in the Constitution and Amendments; redundancy by the framers in this instance alone is not logically tenable. Since trial by court is now permitted in the federal system, a defendant who waives jury trial surely has a constitutional right to an impartial judge, as well as to an impartial jury.

In *Schick v. United States,* 195 U.S. 65 (1904) Mr. Justice Harlan, dissenting, suggested this interpretation of the relationship of the Article III and the Sixth Amendment:

> "Those who opposed the acceptance of the Constitution said, among other things, that the words of that instrument, strictly construed, (Art. III, § 2) admitted of a secret trial, or of one that might be indefinitely postponed to suit the purposes of the Government, or of one taking place in a State or district other than that in which the crime was committed. The framers of the Constitution disclaimed any such evil purposes; but in order to meet the objections of its opponents, and to remove all possible grounds of uneasiness on the subject, the Sixth Amendment was adopted in which the essential features of the trial required by section 2 of Article III are set forth."

The jury system was imposed on the federal government not only because it had value and was an esteemed institu-

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[8]It should be noted that it was not until 1930 in *Patton v. United States,* 281 U.S. 276 (1930), that this Court definitely decided that jury trial in federal criminal cases could be waived in favor of trial by court. Although this result appears both wise and practical, it hardly comports with the clear language of Article III, § 2(3) of the Constitution.

tion at common law, but because the framers, reflecting the view of the states, were attempting to obviate the pervasive fear of an all powerful, distant and possibly corrupt central government. See, *e.g.*, the Federalist, No. 83 (Hamilton); Declaration of Rights (1774); Declaration of Independence (1776). The jury in this context has value as a reserved power of the local population in the criminal process and as a limitation on the central authority which may or may not be relevant to the different problems of the states.

We submit that the inclusion in the Constitution of a right to trial by jury as a limitation on a feared despotic central government provides insufficient justification for imposing on fifty different states with different problems a rigid system with its essentially arbitrary technical incidents. Such rigidity would not enhance the fundamental fairness of the trial but would stifle needed experimentation and innovation under the "dead hand of the common-law."[9]

> "[B]eyond requiring conformity to standards of fundamental fairness that have won legal recognition this Court always has been careful not so to interpret [the Fourteenth] Amendment as to impose uniform procedures upon the several states whose legal systems stem from diverse sources of law and reflect different historical influences." *Fay v. New York*, 332 U.S. 261, 294 (1947);

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[9]The phrase is taken from *Washington v. Texas*, 388 U.S. 14, 22 (1967).

III

THE COMMENT ON EVIDENCE MADE BY THE JUDGE DID NOT VIOLATE ANY FEDERAL CONSTITUTIONAL RIGHT, NOR WAS IT PREJUDICIAL.

A. Even if trial by jury is a federal constitutional right, the comment was proper.

In *Patton v. United States, supra,* at 288, this Court delineated the essential elements of common law trial by jury: 1) the jury must consist of twelve men; 2) the trial must be in the presence and under the superintendence of a judge having power to instruct the jury as to the law and advise them in respect to the facts; 3) the verdict must be unanimous. Thus, the right and duty of the judge to comment is as essential to a proper jury trial as the unanimous verdict. Wigmore states that such comment "must be regarded historically as an essential and inseparable part of jury trial." 9 Wigmore, *Evidence,* § 2551 (3rd Ed. 1940).

The practice of common law judges reached the degree of advising the jury "as regards the verdict they should give, so that it may accord with his views of the law and of the justice." 3 Christy, *The Practice of Law,* 913 (1835). The practice in the federal courts, although not entirely consistent, has largely been in accord with this view.[10] See, *e.g., Hartzell v. United States,* 72 F.2d 569 (8th Cir. 1934); *United States v. Notto,* 61 F.2d 781 (2nd Cir. 1932); *Dillon v. United States,* 279 Fed. 639 (2nd Cir. 1921); *Savage v. United States,* 270 Fed. 14 (8th Cir. 1920); *Morse v. United States,* 255 Fed. 681 (4th Cir. 1918); *Endelman v. United*

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[10]Cases to the contrary, cited by petitioners, Pet. at 9, n. 3, 4 are based on what we consider to be an entirely erroneous interpretation of *United States v. Murdock,* 290 U.S. 389; (1933).

States, 86 Fed. 456 (9th Cir. 1898). In *Endelman, supra* at 462, the trial judge commented:

> "The federal courts allow the judges sometimes to give an opinion on the evidence. I gave my opinion to the other jury, and I will give it to you. I do not see any way that these defendants can be acquitted. Notwithstanding, I charge you that you are the judges of the evidence, and from that evidence it is for you to say whether or not they, or either of them, are guilty."

Comment in the other cited cases is similar. The comment at issue here is, if anything, more restrained. It contains an expression of opinion, based on the evidence, that the defendant had been proved guilty. In addition, it asserts unequivocally that the jury is the sole judge of the facts. This comment is not only proper, but in view of *Patton*, is an essential part of the court's duty under the common law.

Petitioner cites *United States v. Murdock*, 290 U.S. 389 (1933) in support of his argument that this comment on the evidence was improper. An examination of *Murdock* reveals that the comment together with the court's failure to instruct on the defendant's theory of his defense, resulted, in effect, in the redefinition of the word "wilfully" in the statute to "voluntarily" and was thus erroneous on the law. The Court cited *Horning v. District of Columbia*, 254 U.S. 135 (1920), as an example of a case where such comment would be proper. The facts in *Horning* were not disputed; only their legal effect. In *Horning*, the court's comment was in practical effect, an advised verdict. The court's interpretation of the law, however, was correct. Since the comment in both cases was essentially an instruc-

tion as to what constituted the offense charged, neither one is relevant to the comment at issue here.

There is no reason to assume that by citing one example of proper comment this Court meant that as the only proper case. This would virtually abolish the common law duty, since cases with undisputed facts are seldom found.

> "In the Federal Courts the rule that obtains is similar to that in the English courts, and the presiding judge may, if in his discretion he thinks proper, sum up the facts to the jury; *and if no rule of law is incorrectly stated,* and the matters of facts are ultimately submitted to the determination of the jury, it has been held that an expression of opinion upon the fact is not reviewable on error." *Starr v. United States,* 153 U.S. 614, 624-25 (1894). (Emphasis added)

The court's instructions in the instant case correctly stated the law, no defense was withdrawn from petitioner, and the jury was told that the jury was the exclusive finder of fact. The judge merely informed the jury that in his opinion, based on the evidence, guilt had been proved beyond a reasonable doubt. If the court's comment was given deference and consideration by the jury, this is the purpose of comment under the common law. See *Starr v. United States, supra.* If the essential common law requirement that the judge must have power to advise on the facts is not to be eliminated, then this is eminently proper comment in view of the evidence of guilt presented, and the cautionary instructions given.

B. There was no infringement of the right to an impartial jury.

Petitioner argues that the comment of the judge was a denial of due process, citing *Parker v. Gladden, supra.* In

Parker, a bailiff remarked to a juror, "Oh that wicked fellow, he is guilty." This Court held that such an expression of guilt by one not sworn as a witness and subject to cross-examination deprived the defendant of his right to confrontation and to be tried by an impartial jury. The case is totally inapplicable to the situation at issue here. There was no unsworn witness, nor juror likely to be influenced by extrajudicial knowledge or discussion. We have at issue here only the relationship between the judge and the jury, trying a case solely on the basis of the evidence presented in Court.

Petitioner argues that the situations are similar because petitioner, "relying on the division of functions and assuming that the jury would actually be the trier of fact, made incriminating admissions to the judge after the District Attorney had represented that his statements would not be used against him." Petitioner urges that the judge "who could not help but be influenced by those statements, then expressed his opinion on the guilt of petitioner to the jury." Pet. at 18-19.

The flaw in this reasoning, in addition to what we consider an outrageous assumption regarding the integrity and ability of the judge,[11] is that petitioner's statements to the judge before trial, were not highly incriminating but essentially exculpatory (See RT 12-18). If the judge had believed them, and had improperly considered them, it could only have benefited petitioner.

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[11] *Cf., Federal Trade Com'n v. Cement Inst.*, 333 U.S. 683, 702-03 (1948): "Neither the *Tumey* decision [273 U.S. 510 (1927)] nor any other decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law."

In addition, such comment at the time of trial was not error under existing California law. Thus, if petitioner even considered the question, he would have had to assume that the judge could express an opinion on guilt.

The only reason at issue in this case is the relationship of the judge to the jury. Under the common law, the judge's power to comment was extensive. Whether or not that is still the rule or practice has nothing whatever to do with whether the jury is impartial.

C. Even if the comment is considered federal constitutional error, it was harmless by any test.

As we have previously indicated, the Court of Appeal, following *People v. Brock, supra,* found the comment in this case to be error under California law. Applying the California harmless error rule, Calif. Const. Art. VI, § 13, the court affirmed the convictions holding that it was not reasonably proper that a result more favorable to defendant would have been reached in the absence of error.

> "Although the evidence in the instant case was essentially circumstantial, we deem it to be overwhelming. In our opinion the evidence presented by the prosecution, when weighed against the defendant's defense which consisted solely of his own tenuous testimony as to his presence in the vicinity of the Riskin home immediately after the robbery and his possession of the gun in question, is tantamount to evidence which indisputably establishes defendant's guilt."

The conclusion of the Court of Appeal that the evidence in the case was tantamount to indisputable establishment of guilt is fully supported by review of the record. Petitioner was observed, unmasked, by a police officer as he was

leaving the Riskin home; he was found shortly afterwards, hiding in the vicinity; he was identified by the officer as the robber he saw leaving the home; he was wearing clothing as described by the victims and the police officer; he was found in possession of articles stolen from the Riskin home, and they were found not only in the jacket, but in his trousers pockets; when discovered, he attacked the police officers, and finally, a gun found where he was captured was identified as the one which fired a bullet casing found in his room.

Under *Chapman v. California*, 386 U.S. 18 (1967), federal constitutional error is harmless when, beyond a reasonable doubt, the error did not contribute to the verdict.[12] The facts in this case establish guilt conclusively. Petitioner's argument that he "contradicted directly every bit of testimony and every possible inference pointing to guilt," is frivolous. He told a totally unbelievable story. We submit that the error is harmless not just beyond a reasonable doubt, but to a near certainty. It is utterly inconceivable that the jury would have reached a different verdict, had no comment been made.

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[12]Since error here, if any, did not affect the basic fairness of the trial, it cannot be said that it is *per se* prejudicial. See *Chapman* at 23.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the petition for writ of certiorari be denied.

Dated, San Francisco, California,
April 12, 1968.

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